No. 382

Supreme Court of the United States

October Term 19

VAUGHAN B. CONNELLY, Debtor
Petitioner,

v.

CENTRAL STATES SOUTHEAST and SOUTHWEST AREAS PENSION FUND,
Respondent.

Petition for a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

IRVING M. WOLFE
Attorney for Petitioner
1204 Biscayne Bldg.
Miami 32, Florida

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To the Honorable Earl C. Warren, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States.

The Petitioner, VAUGHAN B. CONNELLY, Debtor, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on March 29, 1963.

OPINION BELOW

The Opinion of the District Court for the Southern District of Florida dated October 26, 1962; (R. 129) is not reported but is reproduced at Appendix B, *infra* p. 34.

The Opinion of the Court of Appeals for the Fifth Circuit dated March 29, 1963 (R. 143) is reported at 315 F.2d 683 and, for the Court's convenience, is reproduced at Appendix A, *infra* p. 23.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on March 29, 1963, (R. 155) and a copy thereof is appended to this petition in Appendix C at p. 39.

On July 11, 1963, (R. 193) the Court of Appeals for the Fifth Circuit denied a petition for rehearing and a copy thereof is appended to this petition in Appendix D at p. 41.

On July 19, 1963, the Honorable Richard T. Rives, United States Circuit Judge entered an order staying the mandate of the United States Court of Appeals for the Fifth Circuit for a period of thirty days. A copy of said order is appended to this petition in Appendix E at p. 42.

The petition is filed timely. (Title 28 U.S.C. Sec. 2101 (f), (62 Stat. 961 and 63 Stat. 104). The jurisdiction of this Court is invoked under 11 U.S.C. Sec. 47(c), (30 Stat. 553 as amended), and Title 28 U.S.C. 1254 (1); (62 Stat. 928).

QUESTIONS PRESENTED

1. An unrecorded instrument modifying and altering the terms of a recorded instrument cannot affect a bankrupt estate simply because both instruments prior to the bank-

ruptcy proceedings were executed by a party subsequently appointed in the bankruptcy proceedings as the debtor in possession for the estate.

2. A lien on real estate, the title to which is in a bankrupt estate not having been established or proved, cannot be valid.

3. The status of a lien on realty, the title to which is in a bankrupt estate, is controlled by the State recording statutes as interpreted by the various State courts wherein said real estate is located, and by the restriction contained in the Acts of Congress relating to Bankruptcy.

STATUTES INVOLVED

1. §57(h), Bankruptcy Act [11 U.S.C. §93(h)]:

> "h. The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee by agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. Such determination shall be under the supervision and control of the court."

2. §60a(6), Bankruptcy Act [11 U.S.C. §96a(6)]:

> "(6) The recognition of equitable liens where available means of perfecting legal liens have not

been employed is hereby declared to be contrary to the policy of this section. If a transfer is for security of (A) applicable law requires a signed and delivered writing, or a delivery of possession, or a filing or recording, or other like overt action as a condition to its full validity against third persons other than a buyer in the ordinary course of trade claiming through or under the transferor and (B) such overt action has not been taken, and (C) such transfer results in the acquisition of only an equitable lien, then such transfer is not perfected within the meaning of paragraph (2)."

3. §70a, Bankruptcy Act (11 U.S.C. §110a.):

"a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, * * *"

4. §342, Bankruptcy Act (11 U.S.C. §742):

"Where no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have all the title and exercise all the powers of a trustee appointed under this Act, subject, however, at all times to the control of the court and to such limitations, restrictions, terms, and conditions as the court may, from time to time prescribe."

5. 28 U.S.C. §1652 (62 Stat. 944):

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in courts of the United States, in cases where they apply."

6. 20 F.S.A. §702.06 (Laws of Florida 1927, c. 11993, §1 as amended, Laws of Florida, 1929, c. 13625, §1):

"In all suits for the foreclosure of mortgages heretofore or hereafter executed the entry of a deficiency decree for any portion of a deficiency, should one exist, shall be within the sound judicial discretion of the court, but the complainant shall also have the right to sue at common law to recover such deficiency, provided no suit at law to recover such deficiency shall be maintained against the original mortgagor in cases where the mortgage is for the purchase price of the property involved and where the original mortgagee becomes the purchaser thereof at foreclosure sale and also is granted a deficiency decree against the original mortgagor."

7. 8 Code of Virginia, (1959 replacement volume), §55-66.4 (Code 1919, §6456, 1930, p. 70; 1932, p. 121; 1944, p. 199; 1952, p. 468):

Statutory Procedure for Releasing Property, Real or Otherwise, From Lien.

8. 8 Code of Virginia, (1959 replacement volume), §55-66.5 (Code 1919, §6456; 1926, p. 81; 1930, p. 70; 1932 p. 121; 1944, p. 199; 1956, p. 426):

Statutory Procedure for Releasing Property, Real or Otherwise, From Lien by Court Procedure.

9. 8 Code of Virginia, (1959 replacement volume) §55-96, (Code 1919, §5194; 1922, p. 474; 1944, p. 356):

"Contracts void as to creditors and purchasers until recorded . . .

". . . shall be void as to all purchasers for valuable considerations without notice not parties thereto and lien creditors until and except from the time it is duly admitted to record in the county or corporation wherein the property embraced in such contract, deed or bill of sale may be, but the mere possession of real estate shall not of itself be notice to purchasers thereof for value of any interest or estate therein of the person in possession. A recordation under this section shall not affect the rights of a creditor required under §55-152 . . . "

10. 8 Code of Virginia, (1959 replacement volume), §55-106 et seq. (Code 1919, §5204 et seq.):

Recording Statutes

11. 8 Code of Virginia, (1959 replacement volume) §55-112 (Code 1919, §5225):

Establishing a Torrens System of Recordation

STATEMENT

Central States Southeast and Southwest Areas Pension Fund[1] commenced a real property mortgage foreclosure action against Vaughan B. Connelly[2] and others on property situated and located in Dade County, Florida, in the City of Miami[3]. The mortgage foreclosure proceeding was filed in the United States District Court for the Southern District of Florida, Miami Division, the Honorable Emett C. Choate presiding. The foreclosure proceeding was commenced in the early part of 1960 and on August 24, 1960, the United States District Court for the Southern District of Florida, Miami Division, entered its Final Decree of Mortgage Foreclosure. (R. 1-15).

During the pendency of the foreclosure Connelly filed, in the same Court, a Petition seeking relief under the Acts of Congress relating to Bankruptcy, specifically Chapter XI. The original Petition was filed on August 10, 1960; however, there was no conflict of jurisdiction and none is raised by this appeal as to the superseding of one proceeding over the other, or the restraining orders entered in the bankruptcy proceedings which would affect the mortgage foreclosure proceeding.

Th Everglades Property was sold in accordance with an order of the court on September 26, 1960. The sale, conducted by a master, was confirmed by the district court on December 12, 1960 (R. 16-17).

The bankruptcy matter reverted to a Chapter XII

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[1]Hereafter, Pension Fund.
[2]Hereafter, Connelly.
[3]Hereafter, Everglades property.

proceeding under the Acts of Congress relating to Bankruptcy, and on February 17, 1961, a Petition for the entry of an order establishing validity and priority of liens, etc. and for a Rule to Show Cause thereon was filed by the debtor (R. 17-34). Notice and service of the Rule was had (R. 34-42).

For the purposes of these proceedings the Court and the litigants need only concern themselves with the property in Alexandria, Virginia, hereinafter referred to as the Virginia property, and adequately described as Item 1, Exhibit A, Real Property (R. 21 & 22).

The Pension Fund filed an Answer to the Rule to Show Cause and claimed an $800,000.00 lien on the Virginia property. The Answer further alleged the mortgage foreclosure sale and the purchase of the property involved by the Pension Fund, by bidding $2,500,000.00 to be credited against the mortgage claim. It further set forth additional claims of $114,255.00 expended by the purchasers of the Everglades property and claimed that such expenditure was an amount to be added to the unpaid balances due and owing under the mortgage and final Decree.

For the purposes of the Chapter XI and Chapter XII proceedings Connelly was appointed a debtor in possession, as is admitted by the Pension Fund (R. 43-45).

The debtor in possession filed his reply to the Answer to the Rule to Show Cause (R. 46-49).

A hearing was held before the Referee on the issue joined by virtue of the Answer filed by the Debtor in

Possession (R. 46-49) and the Response to the Rule to Show Cause filed by the Pension Fund (R. 42-45). No testimony was offered by the Pension Fund at the hearing (R. 63-108). Connelly was called as a witness for the purposes of identifying his signature on various and sundry agreements which were admitted into evidence as exhibits, to-wit: Exhibit 1, Deed of Trust dated January 16, 1959; Exhibit "A", Loan and Pledge Agreement dated January 16, 1959, (including Supplemental Agreement to Exhibit "A" dated August 24, 1959), (R. 108-129).

The Deed of Trust (Exhibit 1) was recorded in Alexandria, Virginia since the property involved was located there.

The Loan and Pledge Agreement (and the Supplement thereto) were never recorded either in Alexandria, Virginia or in Dade County, Florida. The district court presiding over the Everglades property mortgage foreclosure proceedings reserved its jurisdiction and severed said proceedings from the bankruptcy proceedings and specifically permitted the Pension Fund to continue the prosecution of the mortgage foreclosure of the Everglades property (R. 170).

M. Louise Connelly submitted all of her right, title and interest in the debtor's property to the jurisdiction of the Bankruptcy Court. There is no contention on this point.

The January 16, 1959 Deed of Trust involving the Virginia property provided for an $800,000.00 indebtedness which the said deed of trust secured, said indebtedness bore 6% per annum interest and both the principal and

interest were evidenced by one promissory note which was payable eight years from date with interest at maturity. The Deed of Trust further provided:

> "The note secured hereby is given as collateral security for a larger indebtedness secured by real estate in Dade County, Florida, and the indebtedness hereby secured shall be considered paid in full at such time as the sum of One Million Three Hundred Thousand Dollars ($1,300,000.00) has been paid on the principal of the indebtedness in Dade County, Florida, herein above mentioned." (R. 109 & 110)

The Referee, having reviewed the Final Decree of Foreclosure and confirmation of the sale, the Virginia property Deed of Trust, and the collateral agreement, entered his Order disallowing the lien status of the Deed of Trust on the Virginia property (R. 52-54).

The Referee made no determination on the deficiencies in the mortgage foreclosure suit involving the Everglades property inasmuch as he interpreted the August 10 and 24, 1960 Orders of the district judge (R. 170 and 1-15) to reserve to the said district judge such rights.

However, the Order of confirmation of sale does not specifically reserve to the Pension Fund the right to proceed and seek deficiencies, nor does said Order establish a deficiency in favor of the Pension Fund (R. 1-17).

The Pension Fund, having been aggrieved by the Order disallowing the lien on the Virginia property, filed

its Petition for Review (R. 55-58) and the Referee issued his Certificate of Review thereon (R. 58-62).

After the perfection of the record the matter was argued, i.e., the Petition for Review, before the Honorable William A. McRae, Jr., District Judge. On the 26th day of October, 1961, the District Judge reversed the Order of the Referee (R. 129-134).

A notice of appeal from the said Order of Reversal was filed by Connelly (R. 134). The appeal was perfected and argued and the appellate tribunal affirmed the lower court (R. 155). The Opinion dated March 29, 1963 (R. 143) is reported at 315 F.2nd 683 and is reproduced for the Court's convenience at Appendix A, *infra* p. 23.

A Petition for Rehearing and a supporting brief was filed by Connelly (R. 156-183). The Pension Fund replied thereto (R. 184-192). The said Petition for Rehearing was denied (R. 193).

A Stay of the Mandate to be issued by the Court of Appeals was applied for and obtained by Connelly on July 19, 1963. It is reproduced for the Court's convenience at Appendix E, *infra* p. 42.

REASONS FOR GRANTING WRIT

The United States Court of Appeals for the Fifth Circuit in applying the several provisions of the Bankruptcy Act, to-wit: §70 a [11 U.S.C. §110 a]; §60 a (6); [11 U.S.C. §96 a (6)] §342, [11 U.S.C. §742] providing for the rights and title of a debtor in possession as affected by un-

recorded agreements is contrary to the substantive law of the United States of America as determined by the legislative expression of the Congress of the United States and applied by this Court and the United States Court of Appeals of the various circuits.

Article I, Section 9, Clause 4 of the Constitution of the United States of America vests Congress with the power to establish uniform laws on the subject of bankruptcy throughout the United States. This exclusive power is not unrestricted, for in the enactment of the various statutes affecting bankruptcy matters, Congress has inscribed various limitations on the field of federal authority. Hence the federal courts administering bankrupt estates are governed by various and sundry state statutes and the limitations and the rights created thereby.

This Court in interpreting the Congressional intent as to the establishing of a date wherein certain rights may be perfected in bankruptcy proceedings and the extent of said rights as they affect the bankrupt estate has ruled that the date of the filing of the original petition in the proceedings and not some pre-existing or retroactive time is the determining factor. Therefore, the rights of a creditor holding a lien are vested as of the date of the bankruptcy, not prior or subsequent. [*Lewis v. Manufacturers National Bank of Detroit*, 364 U.S. 607, 81 S.Ct. 347, 5 L.Ed. 2d 323 (1961) — Mr. Justice Douglas delivering the opinion of the Court].

The entire administration of the Bankruptcy Act by the federal courts is based upon the equitable principle of fair and equal distribution of a bankrupt's assets among

the various classes of creditors subsequent to establishing their respective classifications and priority for distribution in accordance with the applicable statutory allowances and limitations. Basic in this procedure is the necessity to classify secured and unsecured creditors respectively.

A creditor entitled to be recognized in a secured status must discharge certain prerequisites. The security on which the claim is based must be recognized as such within the structure of the state statutes of the various states wherein the said property is located and affected by the lien claimed.

The Bankruptcy Act contains provisions limiting the method and mode of perfecting liens within a certain allowable interval and the interrelationship of the creditors to the estate is fixed as of the time of the bankruptcy, i.e., the date of the filing of the original petition.

A debtor in possession, just as a trustee or receiver, personifies the entity of the bankrupt estate. He is representative of a corpus to which the said creditors look to seek marshalling, liquidation and distribution. The Bankruptcy Act protects his status as such and creates a barrier to afford the estate an area within which it is to be administered upon equitable principles so that no creditor may be classified in a group in which he has no status; thus, in theory distribution, imaginery or real, is available to all creditors and can not be unbalanced, discriminatory or inequitable.

The Bankruptcy Act provides that a debtor in possession is not the same party to the proceedings as the debtor, but, in fact, is regarded as a trustee and or re-

ceiver. [§70 a., Bankruptcy Act, 11 U.S.C. §110 *a.* and §342, Bankruptcy Act, 11 U.S.C. §742]. That statutory mandate has been recognized by this Court and the various Courts of Appeal of the United States. [See Vol. 8, Collier on Bankruptcy, 14th Ed., pp. 173, 792 and 798, and *cases cited therein*].

However, the United States Court of Appeals for the Fifth Circuit, in its Opinion below has made a radical departure from this clear, consistent and unambiguous principle of law. [*Connelly v. Central States Pension Fund*, 315 F.2d 683 at 686, 5th Cir. (1963), App. A, *infra* p. 32]. This conclusion is a radical departure from known statutory precepts and judicial interpretations in that it creates a budding theory that a debtor in possession is bound by unrecorded instruments.

While the Opinion below suggests adherence to the Virginia statutes affecting the rights of parties placed on notice by recorded documents it overlooks and perhaps misinterprets the true import of the relevant Virginia Statutes and the interpretations thereof by the Virginia courts. The Opinion below interprets the Virginia law to place a prudent person upon inquiry to determine the effectiveness of an unrecorded collateral pledge because a recorded instrument (which does not refer to the collateral pledge) contains verbiage as to the method of discharge of the recorded debt. [*Connelly case, supra*, at p. 686, *infra* p. 31.] Thus the learned judges below have misinterpreted the statutes of the State of Virginia, and the decisions of the Supreme Court of Appeals of Virginia.

The recording statutes of the State of Virginia only place prospective purchasers and future encumbrancers

on notice. These are the only groups affected or bound by constructive notice, requiring inquiry to determine the true status of the condition of the title of the property in which they are interested. [*Charis v. Gibbs*, 198 Va. 379, 94 S.E. 2d 195, (1956), S. Ct. of Appeals of Va., applying 8 Code of Virginia, (1959 replacement volume) §§55-96, 55-106 et seq. and 55-112]. Thus the Statutes of the State of Virginia as interpreted by the highest courts of Virginia differentiate as to parties that are bound by constructive or implied notice stemming from recorded instruments.

Therefore, a Trustee or a Debtor in possession duly qualified and appointed, is not within the classification placed upon him by the Opinion below.

The Courts of Virginia maintain that the applicable Virginia statutes create obligations of implied notice only affecting those parties who are under an obligation to search the records, i.e. prospective purchasers or future encumbrancers. It is only this group that is bound by what the records imply or what may be uncovered by further investigation because of the recorded implications. [*Lynchburg, etc. Loan Co. v. Fellers*, 96 Va. 337, 31 S.E. 505 (1898), S.Ct. of Appeals of Va.].

It must be remembered, under Virginia law, mere suspicion, no matter how strong it may be will not be regarded, as an implication giving rise to a requirement to search further. For a record to qualify under the Virginia rule which will bind a prospective purchaser or future encumbrancer, there must be strong, clear and concise facts leading to an implication imputing notice. [*Hunton v. Wood*, 101 Va. 50, 43 S.E. 186 (1903), S.Ct. of Appeals of Va.].

An unrecorded or unperfected legal lien is contrary to the policy of the Bankruptcy Act. [§60 a. (6), Bankruptcy Act, 11 U.S.C. §96 a. (6)].

A Virginia Federal District Court interpreting a similar provision contained in the then applicable Bankruptcy Act held that the time of recording a lien or a deed for the purposes of the Bankruptcy Act is held to be the time of the transfer or the creation of the lien. [*In re Montague*, 143 F. 428, D.Ct. E. I Va., (1905), applying the Virginia Statutes and §60 (a) (b), Bankruptcy Act, 30 Stat. 562, U.S. Comp. St. 1901, p. 3445, as amended February 5, 1903, c. 541, 32 Stat. 799, U.S. Comp. St., Supp. 1905, p. 689].

Therefore, it appears that a misapplication of the Virginia law as it affected the status of the parties is apparent in the Opinion below, and a dangerous departure which may lead to confusing precedent, has been established by the lower courts to the detriment of a uniform application of the Bankruptcy law.

In a bankruptcy proceeding, before a party can be classified as a secured creditor, he must establish the basis of his security within the statutory requirements. [§57 (h), Bankruptcy Act, 11 U.S.C. §93 (h)]. This Section of the Act gives the Bankruptcy Court exclusive supervision and control of the matter and that an obligation must be due and owing by the estate before security for its repayment can be allowed must be proven. Yet, the lower courts create a trend which allows the estate to be obligated to repay a secured indebtedness under conditions whereby the estate is required to recognize unrecorded documents contrary to state law, and secondly where no

legal proof has been made that any sums are owed. [*Connelly case, supra*, at p. 686; *infra*, p. 31].

This application of law overlooks the Florida procedures precluding the entry of deficiency decrees in mortgage foreclosures under certain circumstances. This Court has recognized that such procedures are valid and constitutional. [*Gelfert v. National City Bank of New York*, 313 U.S. 221, 61 S.Ct. 898, 85 L.Ed. 1299, (1941); see also, *Angel v. Bullington*, 330 U.S. 183 at 191, 67 S.Ct. 657 at 662, 91 L.Ed. 832 at 838 (1947)].

Thus the Florida Statutes concerning the obtaining of a deficiency decree, the election of the procedural remedies to obtain the same are governed by estoppel, laches or other equitable or legal principles where real estate situated in Florida is subjected to federal mortgage foreclosure jurisdiction. [Act June 25, 1948, c. 646, 62 Stat. 944, 28 U.S.C. 1652. *Angel v. Bullington, supra*; 20 F.S.A. 702.06; *Belle Meade Development Corp. v. Reed*, 114 Fla. 350, 153 So. 842, S.Ct. Fla. (1934); *Mabson v. Christ*, 96 Fla. 756, 119 So. 131, S.Ct. Fla. (1928); as the proper time to apply for the deficiency under Florida law, *Katz v. Koolish*, 142 So.2d 759, Court of Appeal of Florida, Third District (1962); *Life and Casualty C. of Tenn. v. Tumlin*, 138 Fla. 447, 189 So. 406, S.Ct. Fla. (1939)].

A misconception of the status of the litigation in the trial court by the Opinion below is clear. [*Connelly case, supra*, p. 686, App. A, *infra*, p. 30.].

The Opinion below fails to evaluate the matters available for litigation on the bankruptcy side of the trial court. The mortgage foreclosure on the Everglades property was

in progress when the original petition in the bankruptcy proceedings was filed, and therefore the district court, prior to vesting in Connelly the powers of a trustee (debtor in possession) under the Bankruptcy Act, removed from the bankruptcy proceedings the Pensions Fund's then pending foreclosure suit (R. 170). The district court proceeded in the foreclosure suit on the Everglades property by entering a Final Decree of Foreclosure on August 24, 1960 (R. 1) and an Order confirming the master's sale December 12, 1960 (R. 16). At no time in the foreclosure proceedings was reference made or reservation had as to the Virginia property. No reservation was allowed for the exhaustion of security and no attempt had been made to establish the security of the deed of trust in question. It is therefore apparent that the Opinion below confuses the dual application of the trial court's jurisdiction and the restrictions it imposed upon the estate concerning the course of future litigation of the respective claims involved.

A grievous oversight is contained in the Opinion below in that it misconstrues the district court's removal from the bankruptcy proceedings the matter of the allowance of a deficiency by specifically reserving said issue to the law side of the district court in the mortgage foreclosure proceedings (R. 170).

Therefore, the duty and burden to obtain the deficiency in some amount lay with the Pension Fund before it could come into the bankruptcy proceedings to establish a lien, arguendo, no lien security can be supported without a sum owing by the estate. Here the learned judges below reasoned that a deed of trust on property owned by the estate need not be supported by considera-

tion, for the Opinion held that the lien validity of the deed of trust does not involve the awarding of a deficiency decree. [*Connelly case, supra*, at p. 686; App. A, *infra*, p. 31.]

To bolster this premise, a tangent application of an abstract principle of law was applied; simply, that in Florida, a foreclosure sale stands to establish the value of mortgaged property. However, this premise overlooks the situations in which it is applied; mainly, that where deficiency decrees are sought in mortgage foreclosure proceedings subsequent to sale, the Court can regard, if it sees fit, the value of the mortgaged property as reflected by the foreclosure sale as the basis for computing a deficiency, provided application therefore is timely made in accordance with the Florida Statutes and procedures.

Florida jurisprudence recognizes the doctrine of equitable estoppel in regard to the timely application for a deficiency decree, and it prohibits such awards where, by implication, the court deems the deficiency waived by the conduct of the mortgagee in the prosecution of the cause. The Supreme Court of Florida has approved the disallowance of a deficiency as not being an abuse of discretion where the trial chancellor denied the deficiency because a mortgagee redeemed the property at an unreasonably low bid. [*Houk v. Weiner*, 53 So.2d 304, S.Ct. Fla. (1951)]. The Opinion below made no allowance for this principle.

The Opinion below fails to apply the legal doctrine of operation of the discharge from a lien of one of several parcels of real estate given as security for the repayment of an indebtedness, where the value of one parcel which

has been foreclosed) is sufficient to discharge the total obligation owed. Hence if the mortgagee redeems one of several parcels, he discharges from the lien the remaining properties. [*Burpee v. Parker*, 24 Vt. 567, S.Ct. Vt. (1852)]. This doctrine of partial satisfaction or release is not only recognized by statute in Virginia, but the courts of Virginia are empowered in proper proceedings to release realty from liens in such circumstances. [8 Code of Va., (1959 replacement, Vol.), §55-66.4 (Code 1919, §6456; 1930, p. 70; 1932, p. 121; 1944, p. 199; 1952, p. 468) and §55-66.5 (Code 1919, §6456; 1926, p. 81; 1930, p. 70; 1932, p. 121; 1944, p. 199; 1956, p. 426)].

The courts below further appear to have misconstrued the theory of law recognized in Florida that payment does not necessarily mean money. It may mean whatever the parties themselves accept as such. [*See City of Sanford v. Ashton*, 131 Fla. 759, 179 So. 765, S.Ct. Fla. (1938), approved by the United States Court of Appeals, 5th Cir.; *City Building Corp. v. Joseph D. Farish, Jr.*, 292 F.2d 620 at 622 (1961)].

CONCLUSION

It appears to be unbecoming in the administration of an equity procedure to allow the incongruous conditions created by the Opinion below to stand. For in so doing, the tangent departures from the precepts of the applicable Federal and State statutes can lead only to the creation of a false foundation to allow the erecting of an edifice consisting of splinter reasoning, resulting in the creation of unfounded refinements eliminating the true status of the personification of a bankruptcy estate in the trustee. This approach will launch the eroding forces to detract from

and diminish the trustee's (debtor in possession) status as to the title of the estate vested in him and the inequitable forces to effectuate a decrement of the protection afforded the estate by both the Federal Bankruptcy Act and the statutes of the various and sundry states; culminating with the courts allowing unrecorded documents to govern the status of liens affecting the estate's title to real estate. It therefore appears that in the interests of justice, the instant petition for a writ of certiorari should be granted.

Respectfully Submitted,

IRVING M. WOLFF
Attorney for Petitioner
1204 Biscayne Bldg.
Miami 32, Florida

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19,667

VAUGHAN B. CONNELLY, Debtor,

Appellant,

versus

CENTRAL STATES SOUTHEAST and SOUTHWEST AREAS PENSION FUND,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(March 29, 1963)

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge.

RIVES, Circuit Judge: In a proceeding brought by the Trustees for Central States Southeast and Southwest Areas Pension Fund[1] against Vaughan B. Connelly[2] and others to foreclose a mortgage on property in the City of Miami, Dade County, Florida, the district court entered a decree of foreclosure on August 24, 1960. In that decree the district court found the amount of the mortgage debt as of August 19, 1960, exclusive of costs and attorneys' fees, to be the sum of $4,604,257.70, and the amounts of three liens superior to the mortgage as of the same date to be $1,777.77, $38,699.53 and $1,297.22. The court directed that the Everglades property be sold on September 26, 1960, and retained jurisdiction to assess any deficiencies against Connelly.

Meanwhile, on August 10, 1960, Connelly filed in the same court a petition seeking relief under Chapter XI of the Bankruptcy Act, which was converted into a Chapter XII proceeding. On February 17, 1963, the debtor Connelly petitioned the Referee in Bankruptcy for the entry of an order establishing validity and priority of the liens. Pension Fund answered the rule to show cause issued on that petition and claimed an $800,000.00 lien on certain described property in Alexandria, Virginia, hereafter referred to as the Virginia property. This appeal relates solely to the Virginia property.

At the mortgage foreclosure sale Pension Fund had purchased the Everglades property at a bid of $2,500,000.00 to be credited against the mortgage claim. The

[1]Hereafter, Pension Fund.
[2]Hereafter, Connelly.

court had confirmed the sale subject to the amounts due the three prior lien holders. In its answer to the rule to show cause, Pension Fund set forth additional claims of $114,255.00 to be added to the unpaid balance owing under the mortgage.[1]

As debtor in possession, Connelly filed his reply to Pension Fund's answer in which he admitted that the deed of trust on the Virginia property was duly recorded, but called attention to its provision which reads:

> "The note secured hereby is given as collateral security for a larger indebtedness secured by real estate in Dade County, Florida, and the indebtedness hereby secured shall be considered paid in full at such time as the sum of One Million Three Hundred Thousand ($1,300,000.00) dollars has been paid on the principal of the indebtedness in Dade County, Florida, hereinabove mentioned."

Connelly's reply continued:

> "That by the said Answer it is admitted that the said sum of $2,500,000.00 has been credited as payment by virtue of the purchase. Thus by operation of the instruments involved the $800,000 collateral lien should be canceled of record."

Upon the hearing before the Referee, the Pension Fund offered the deed of trust on the Virginia property. The Pension Fund offered also a "Loan and Pledge Agree-

[1] We do not pass on those claims, their validity or amounts.

ment" executed as of the date of the deed of trust on the Virginia property and a supplemental agreement, neither of which had been recorded. The "Loan and Pledge Agreement" detailed the terms of the pledge of the deed of trust and of a "Fund" as collateral to further secure a "Note" in the principal sum of $3,300,000.00 secured by a "Mortgage" on the Everglades property and provided:

> "The Fund and the Alexandria Mortgage shall be considered in all respects as additional collateral, hereinafter referred to as 'Collateral' for the payment of the Note and shall be held by the Trustee upon the following terms and conditions:
>
> . . . . . .
>
> "(e) When the principal of the Note has been reduced to $2,550,000.00 and the Mortgagees will, at the request of the Mortgagors, and if the Mortgagors be not then in default request the Trustee to release the Fund to the Mortgagors; and when the principal of the Note has been reduced to $2,000,000.00, the Mortgagees will, at the request of the Mortgagors, and if the Mortgagors be not then in default, request the Trustee to release to the Mortgagors the Alexandria Mortgage and terminate the trust.
>
> "(f) The term 'default,' when used in this instrument, shall extend to any default in the Note, the Mortgage, or the Alexandria Mortgage,

it being agreed that a default in any shall constitute a default in all.

. . . . . .

"No payment of principal or interest shall be required to be made on the Alexandria Mortgage so long as the Mortgagors make payments on the Note promptly, as the same become due and payable and otherwise keep and perform the terms, covenants and conditions of the Note and the Mortgage."

The supplemental agreement consented to an increase of the mortgage indebtedness from $3,300,000.00 to $4,300,000.00.

The Referee, having reviewed the decree of foreclosure and confirmation of the sale, the deed of trust on the Virginia property, and the agreements, entered his order providing in part:

"Ordered, that in accordance with the final decree entered by the Honorable Emett Choate in the cause entitled Floyd C. Webb, et al. v. Vaughan B. Connelly and M. Louise Connelly, et al., =10,031, the Referee in Bankruptcy has no jurisdiction to try the deficiencies now pending in said cause, inasmuch as the said Final Decree entered therein reserves unto the District Court the right to make a determination of the said deficiencies and the said debtor in possession in

the instant cause is directed to apply to said Court for said determination and that nothing herein contained shall have prejudiced the rights of either parties in prosecuting said claim of deficiency. It is further

"Ordered, that from the contents of the Deed of Trust executed January 16, 1959, and duly recorded in the City of Alexandria, Virginia, that the said conditions contained in said Deed of Trust as to the reduction of the indebtedness on the Florida real property having been fulfilled, that the said Francis J. Murtha, et al, as Trustees of the Central States, Southeast and Southwest Areas Pension Fund, are not entitled to a lien on the said Alexandria, Virginia, real property, and that the said Deed of Trust upon the following described property, to-wit: . . . "

The district court, Judge McRae sitting, reversed the order of the Referee, stating:

"The Court is of the opinion that the order of J. B. Booher, Referee in Bankruptcy, of July 24, 1961, holding the lien of the Pension Fund on the above described property as invalid, is in error.

"The term 'payment' as used in the note and deed of trust given by Connelly to the Pension Fund, when given its common and ordinary meaning, was intended by the parties to mean payment of cash to reduce the mortgage indebted-

ness held by the mortgagor in the normal course of business and pursuant to the terms of the mortgage on the Everglades Hotel, and could not be construed as meaning that when the mortgagee pursues the security of the mortgage after default and sells the security, that the proceeds of such sale applied to the final decree of foreclosure would constitute a payment of the principal indebtedness of the mortgage:

"The pursuing by the mortgagee of his rights against one of several parcels of land given as security for a debt after default by the mortgagor cannot bar the mortgagee's rights to pursue the balance of the security pledged so long as the mortgagor cannot bar the mortgagee's rights to pursue the balance of the security pledged so long as the mortgagee has not realized the full amount due him under the terms of the final decree of foreclosure.

"It is the opinion of this Court that the bid at the foreclosure sale by the Pension Fund did not in any way satisfy or fulfill the conditions of the note and deed of trust given by Connelly to the Pension Fund on the above described property, and that the said note and deed of trust are still valid and in force and effect."

The debtor Connelly now appeals from the judgment of the district court.

Both parties agree that Pension Fund had the burden of establishing the validity, amount and priority of its security. Connelly urges that Pension Fund has failed to meet that burden. Connelly's contention may be summarized as follows. Mortgage foreclosure proceedings are governed by Florida Statute, 20 F. S. A. Secs. 702.02 and 702.06. Contrary to what was stated in the Referee's order, the district court failed in the order confirming the master's sale to reserve jurisdiction to assess a deficiency, and such failure precludes the recovery of any deficiency. Connelly further contends that value of the mortgaged property must be established by the seeking of a deficiency decree after sale.

Whether these contentions are sound under the law of Florida was not clearly presented for review to the district court, and probably is not presented on this appeal. Connelly sought no review of the part of the Referee's order declining to assume "jurisdiction to try deficiencies" and providing that "the said debtor in possession in the instant cause is directed to apply to said Court for said determination and that nothing herein contained shall have prejudiced the rights of either parties in prosecuting said claim of deficiency." The judgment of the district court on the petition for review in no way passed upon the question of deficiency, except that that judgment did adjudge the note and deed of trust on the Virginia property to be a valid lien upon the property in the amount reflected in the note. Since the matter does not go to jurisdiction, and was not clearly raised on petition for review, we doubt whether it can be raised on appeal. See *Clemons v. Liberty Savings & R. E. Corp.*, 5 Cir., 1932, 61 F.2d

448; *Supreme Forest Woodmen Circle v. Belton, Texas*, 5 Cir., 1938, 100 F.2d 655; 2 Collier on Bankruptcy, 14th Ed., § 25, p. 964, n. 5.

Assuming arguendo that it is properly raised, we would comment that the question of a deficiency decree is not involved in the determination of the validity of the deed of trust on the Virginia property. It seems to us that only after the exhaustion of any security given by Connelly to Pension Fund, including the enforcement of the lien on the Virginia property, can the question of any deficiency be determined. Further, so long as the foreclosure sale stands, it establishes the value of the mortgaged property. *Tendler v. Gottlieb*, Fla. App. 1961, 126 So.2d 308, 309, 310, and authorities there cited.

Connelly insists that, as a debtor in possession, he has the status of a trustee and is not bound by an unrecorded instrument as it affects the status of a recorded lien; citing, *Lockhart v. Garden City Bank and Trust Co.*, 2 Cir. 1940, 116 F.2d 658, 660; Sec. 242 Bankruptcy Act, 11 U. S. C. A. § 742; Sec. 44 Bankruptcy Act, 11 U. S. C. A. § 72; Vol. 8, Collier on Bankruptcy, 14th ed., pp. 173, 792, 798. Pension Fund does not dispute that insistence as an abstract proposition of law, but says that it is inapplicable because the recording of the deed of trust on the Virginia property was enough to put any prudent person upon inquiry to determine the terms of the collateral pledge referred to in the deed of trust; citing, *O'Neill v. Cole*, 194 Va. 50, 72 S.E. 2d 382 (1952); *First Federal Savings and Loan Ass'n of Miami v. Fisher*, Fla. 1952, 60 So.2d 496; *Chaffee v. McPherson*, Fla. 1957, 95 So.2d 506. We agree,

and hold that Connelly as debtor in possession is bound by terms of the "Loan and Pledge Agreement" and of the "Supplemental Agreement."

Even if that were not true, the condition of the deed of trust itself has not been met. For convenience, we repeat that condition:

> ". . . The note secured hereby is given as collateral security for a larger indebtedness secured by real estate in Dade County, Florida, and the indebtedness hereby secured shall be considered paid in full at such time as the sum of One Million Three Hundred Thousand ($1,300,000.00) dollars has been paid on the principal of the indebtedness in Dade County, Florida, hereinabove mentioned"

On this subject we would add only a few thoughts to those already so well expressed by Judge McRae. Connelly's position is contrary to the obvious intention of the parties as expressed in the deed of trust. In effect, Connelly urges that he should benefit from his own default and breach of the mortgage agreement. Pension Fund has found one case directly in point to the proposition that payment to effect a release of a mortgage means voluntary payment and not an enforced collection by foreclosure of less than the whole debt. *Widmann, v. Hammack*, 110 Wash. 77, 187 Pac. 1091, 42 A. L. R. 468. See also, 3 Jones on Mortgages, 8th ed., para. 3094, p. 570. We agree.

No error appearing, the judgment is

AFFIRMED

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By G. F. Gamucheau
Deputy

New Orleans, Louisiana July 24, 1963

APPENDIX B

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION.

No. 4538-M-Bk-EC

ORDER ON PETITION FOR REVIEW OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND.

Filed Oct. 26, 1961

This Cause coming on to be heard before the Court on the petition of Central States, Southeast and Southwest areas Pension Fund, for review of order entered by the Honorable J. B. Booher, Referee in Bankruptcy, on the 24 day of July, 1961; and the Court having examined the files in the cause, the briefs filed by the petitioner and respondent, and after hearing oral argument of counsel for the petitioner and the respondent, Finds as Follows:

The question presented for determination by this Court was whether or not the order of J. B. Booher, Referee in Bankruptcy, entered on the 24th Day of July, 1961, in canceling the lien of a deed of trust executed the 16th day of January, 1959, by Vaughan B. Connelly and M. Louise Connelly, his wife, as mortgagors, to Central States, Southeast and Southwest Areas Pension Fund, as mortgagees, on property more particularly described in said order and located in Alexandria, Virginia, was proper.

The deed of trust above described and the note given in accompaniment thereto, contained a provision that when $1,300,000.00 had been paid on the principal of a mortgage given by Vaughan B. Connelly and M. Louise Connelly, his wife, to Central States, Southeast and Southwest Areas Pension Fund, on property commonly known as the Everglades Hotel in Miami, Florida, that the note and the lien of the deed of trust on the Virginia property would be canceled. The note and deed of trust on the Alexandria, Virginia property contained a provision that no payments, either in principal or interest, were required on said note and deed of trust so long as the payments on the mortgage given by Connelly and wife to Central States, Southeast and Southwest Areas Pension Fund were kept current.

By reason of the defaults of Connelly and wife and their failure to make the mortgage payments due on the mortgage to the Pension Fund on the Everglades Hotel, the Pension Fund instituted foreclosure proceedings in this Court, being cause number 10,031-M-Civil. This Court entered a final decree of foreclosure on August 24, 1960.

The property covered by the mortgage and commonly described as the Everglades Hotel, was sold at public auction pursuant to the foreclosure decree entered by this Court. At the foreclosure sale, Central States, Southeast and Southwest Areas Pension Fund bid the property in for the sum of $2,500,000.00, and ultimately gained possession of the Everglades Hotel property by order of this Court confirming the foreclosure sale. This sale left a balance due under the terms of the final decree of foreclosure in excess of $2,176,000.00.

In this cause, Vaughan B. Connelly has filed a petition for reorganization pursuant to Chapter XI of the Bankruptcy Act. As a part of said reorganization proceeding, an order to show cause was issued by the Referee in Bankruptcy requiring all secured creditors to come in to prove the amount, lien and priority of their secured claims. Pursuant to said order, the Pension Fund did present to the Referee in Bankruptcy its proof of its lien on the property located in Alexandria, Virginia, and more particularly described in the deed of trust dated January 16, 1959, and recorded in the City of Alexandria, as follows:

Beginning at the westerly corner of the land of Hunting Tower Apts., Sec. 1, Incorporated and in the southeasterly right-of-way line of the Mount Vernon Memorial Highway right-of-way and running thence with the land of said Hunting Tower Apts. Sec. 1, Incorporated south 73 degrees 27′ 45″ east 247.30 feet to a point; thence running through the land of Vaughan B. Connelly the following courses and distances: south 47 degrees 31′ 50″ east, 236.96 feet to a point; thence south 41 degrees 24′ 40″ west 552.35 feet to a point; thence north 77 degrees 17′ 05″ west 284.53 feet to a point; thence with the arc of a curve to the left whose radius is 4147.20 feet and whose chord bearing and chord are north 27 degrees 22′ 03″ east and 498.85 feet, respectively, a distance of 499.16 feet to a point; thence north 23 degrees 27′ 30″ east 57.00 feet to a point; thence north 65 degrees 50′ 10″ west 33.30 feet to a point; and thence north 7 degrees 06′ 10″ east 73.76 feet to the point of beginning, containing 209,780 square feet or 4.8159 acres, and being a part of the land of Vaughan B. Connelly lying south of the Hunting Tower Apt. properties.

Vaughan B. Connelly objection to the lien claim of the Pension Fund on the property above described on the ground that the bid of the Pension Fund of $2,500,000.00 at the foreclosure sale of the Everglades Hotel satisfied the requirement of the note and deed of trust on the Virginia property above described; that upon payment of $1,300,000.00 upon the principal of the indebtedness on the Everglades Hotel mortgage, the note and deed of trust on the above described property should be canceled.

J. B. Booher, Referee in Bankruptcy, held by the order of July 4, 1961 that the bid of $2,500,000.00 had fulfilled the conditions above described, and that therefore the lien of Central States, Southeast and Southwest Areas Pension Fund on the above described property should be canceled and rendered null and void and fully satisfied.

The Court is of the opinion that the order of J. B. Booher, Referee in Bankruptcy, of July 24, 1961, holding the lien of the Pension Fund on the above described property as invalid, is in error.

The term "payment" as used in the note and deed of trust given by Connelly to the Pension Fund, when given its common and ordinary meaning, was intended by the parties to mean payment of cash to reduce the mortgage indebtedness held by the mortgagor in the normal course of business and pursuant to the terms of the mortgage on the Everglades Hotel, and could not be construed as meaning that when the mortgagee pursued the security of the mortgage after default and sells the security, that the proceeds of such sale applied to the final decree of foreclosure would constitute a payment of the principal indebtedness of the mortgage.

The pursuing by the mortgagee of his rights against one of several parcels of land given as security for a debt after default by the mortgagor cannot bar the mortgagee's rights to pursue the balance of the security pledged so long as the mortgagee has not realized the full amount due him under the terms of the final decree of foreclosure.

It is the opinion of this Court that the bid at the foreclosure sale by the Pension Fund did not in any way satisfy or fulfill the conditions of the note and deed of trust given by Connelly to the Pension Fund on the above described property, and that the said note and deed of trust are still valid and in force and effect.

It is Thereupon Considered, Ordered and Adjudged, that the order of J. B. Booher, Referee in Bankruptcy, entered on the 24th day of July, 1961, in this cause is hereby vacated, set aside and held for naught. The Referee is directed to enter his order that the note and deed of trust of January 16, 1959, given by Vaughan B. Connelly and M. Louise Connelly, his wife, to Central States, Southeast and Southwest Areas Pension Fund, filed in evidence before the Referee in this cause, is a valid lien upon the property above described in the amount as reflected in the note.

Done and Ordered this 26 day of October, 1961.

WM. A. McRAE, JR.,
District Judge.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19,667

D. C. Docket No. 4538-M-Bkcy.

VAUGHAN B. CONNELLY, Debtor,

Appellant,

versus

CENTRAL STATES SOUTHEAST and SOUTHWEST AREAS PENSION FUND,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, Vaughan B. Connelly, Debtor, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

March 29, 1963

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 19,667

VAUGHAN B. CONNELLY, Debtor,
Appellant,

versus

CENTRAL STATES SOUTHEAST and SOUTHWEST AREAS PENSION FUND,
Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(July 11, 1963)

ON PETITION FOR REHEARING

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge.

PER CURIAM:

The petition for rehearing in the above-styled and numbered cause is hereby

DENIED.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19,667

VAUGHAN B. CONNELLY, Debtor
Appellant,

versus

CENTRAL STATES SOUTHEAST and SOUTHWEST PENSION FUND
Appellees.

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of

an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 19th day of July, 1963.

/s/ RICHARD T. RIVES
United States Circuit Judge

(ORIGINAL FILED — JULY 22, 1963)

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Supreme Court of the United States

No. 382

VAUGHAN B. CONNELLY, DEBTOR,
Petitioner

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT C. WARD
1240 duPont Building
Miami, Florida — 33131
Attorney for Respondent

WARD & WARD
1240 duPont Building
Miami, Florida — 33131
Of Counsel

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Supreme Court of the United States

No. _____

VAUGHAN B. CONNELLY, DEBTOR,
Petitioner

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTRODUCTION

For purposes of brevity, the Petitioner, Vaughan B. Connelly, Debtor, will be referred to as "Connelly"; the Respondent, Central States, Southeast and Southwest Areas Pension Fund, will be referred to as "Pension Fund"; and references to the Record shall be by the symbol "R".

JURISDICTION

The Petitioner Connelly has made application to this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, directed to an opinion rendered by that court on March 29, 1963 in an appeal wherein Connelly was appellant and the Pension Fund was appellee.

The petition asserts jurisdiction in this Court under the provisions of 11 U.S.C. 47(c) and 28 U.S.C. 1254(1). After a complete reading of the petition, your Respondent fails to find any allegations or suggestions in compliance with Rule 19 of the Revised Rules of the Supreme Court of the United States (formerly Rule 38). There is no assertion that the decision of the Court of Appeals is in conflict with any other Court of Appeals' decision, or that the court has decided an important question of federal law which has not been settled by this Court and that should be settled by this Court, or that it has decided a federal question in conflict with a prior decision of this Court; nor has he presented any other grounds, as outlined in said Rule 19. The only remote indication given by the petition of compliance with Rule 19 is some general statements that the decision of the Court of Appeals has misinterpreted the applicable law of the State of Virginia. This point is discussed under the argument of your Respondent.

This Court, in discussing its jurisdiction in certiorari matters, state in **Magnum Import Co. v. Coty (1923) 262 U.S. 159, 67 Law. Ed. 922, 43 Sup.Ct. 531:**

"The jurisdiction to bring up cases by certiorari

> from Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. **The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing.**" (emphasis supplied)

The petition herein demonstrates that Petitioner seeks nothing more than another hearing from this Court on matters clearly adjudicated by the Court of Appeals.

STATEMENT OF FACTS

In order that the Court can better understand the argument of your Respondent, we include in this brief a resume of the facts leading to the decision of the Court of Appeals. The facts are somewhat repetitious of those contained in the petition, but Respondent feels it is necessary in order to give a continuity to its argument.

In 1959, the Pension Fund loaned Connelly a total of $4,300,000. This loan was secured by a mortgage on the Everglades Hotel located in the City of Miami, Dade County, Florida. The Pension Fund, not being satisfied with the Hotel as the sole security for the loan, required additional collateral security to be placed by Connelly. By reason thereof, Connelly gave to the Pension Fund, as additional collateral security for the mortgage on the Everglades Hotel, an $800,000 deed of trust on vacant property located in Alexandria, Virginia. This is the property which is involved in this particular litigation.

In connection with the giving of the collateral security on the Virginia property and the giving of other collateral security, a loan and pledge agreement was entered into between Connelly and the Pension Fund (R 115 to 127). To evidence this $800,000 collateral pledge of the Virginia property, Connelly and his wife executed a deed of trust under Virginia law, which deed of trust was duly recorded among the public records of Virginia (R 108 to 114). The deed of trust contained the following statement:

> "The note secured hereby is given as collateral security for a larger indebtedness secured by real estate in Dade County, Florida, and the indebtedness hereby secured shall be considered paid in full at such time as the sum of $1,300,000 has been paid on the principal of the indebtedness in Dade County, Florida hereinabove mentioned." (R 109-110)

By reason of defaults in the primary mortgage on the Everglades Hotel, the Pension Fund instituted foreclosure proceedings on the Everglades Hotel in the United States District Court for the Southern District of Florida, Miami Division, which resulted in the entry of a final decree of forclosure on August 24, 1960 (R 1 through 15). The property was sold pursuant to the final decree and the Pension Fund was the successful purchaser; title to the property was delivered to the Pension Fund's nominee (R 16).

In August, 1960, Connelly had instituted proceedings first under Chapter XI of the Acts of Bankruptcy and later under Chapter XII of the Acts of Bankruptcy. In

February, 1961, Connelly filed a petition seeking to have all lien claimants establish the validity, priority and amount of thei lien (R 17) on certain property owned by Connelly, which was the subject matter of the bankruptcy proceedings.

The Pension Fund was served with an order to show cause requiring it to appear and present its claim to a lien on the Virginia property involved in this litigation. The Pension Fund filed its answer to the rule to show cause, setting up the final decree of foreclosure to establish the amount due it, and alleging that at the foreclosure sale it had bid $2,500,000 for the property, and alleging that by subtracting the $2,500,000 bid at the foreclosure sale from the amount due under the final decree, there still remained due the Pension Fund the sum of $2,179,257.70, plus interest and accrual. The Pension Fund claimed a third lien on the Virginia property by reason of the deed of trust given by Connelly to the Pension Fund to secure the funds due on the Everglades Hotel (R 42 to 45).

Connelly filed a reply to this answer of the Pension Fund wherein Connelly admitted the deed of trust, the recording thereof, and that said deed of trust granted to the Pension Fund a collateral lien of $800,000, but alleged that since the deed of trust stated that when the amount of $1,200,000 was paid on the Dade County, Florida mortgage, the Virginia mortgage was cancelled. Connelly claimed that by reason of the Pension Fund's bid of $2,500,000 at the foreclosure sale, this constituted payment sufficient to cancel the lien on the Virginia property (R 46-47).

Connelly also attempted to bring before the Referee in Bankruptcy the question of the Pension Fund's right to a deficiency decree in connection with the difference in the amount bid at the foreclosure sale and the amount still due under the final decree. The Referee entered his order on July 25, 1962 on the issues framed and first held, and rightly so, that he had no right to determine the question of a deficiency since the District Court had reserved jurisdiction on that matter (R 53 and final decree of foreclosure R 15).

The Referee found that the bid at the foreclosure sale of $2,500,000 satisfied the requirements of the deed of trust on the Virginia property and that by reason thereof, the lien of the Pension Fund on the Virginia property was cancelled and rendered null and void (R 52 to 54).

The Court will note that nowhere in the Referee's order did he find that the Pension Fund had failed to prove its lien on the Virginia property. To the contrary, the Referee's order is based upon the fact that there was a valid lien upon the property, but that the conditions of said deed of trust creating said lien had been satisfied and that on that basis, the lien should be cancelled.

A petition for review was taken by the Pension Fund. Connelly sought no petition of review from the decision of the Referee with regard to his lack of jurisdiction to determine a deficiency or to determine the question of values of the Dade County, Florida property. On review, the District Court reversed the Referee and simply held that the bid of the Pension Fund at the foreclosure sale was not a payment under the terms of the Virginia

deed of trust, which would authorize the court to cancel the lien of the Pension Fund on the Virginia property. The court held that the pursuing by the mortgagee of his rights against one of the several parcels of land given as security after default by the mortgagor could not in any way be construed as barring him from pursuing the other security so long as mortgagee had not realized the full amount due him (R 129 to 134).

There is no mention in the District Court's opinion about the question of a deficiency decree. From this decision, Connelly prosecuted an appeal to the United States Court of Appeals for the Fifth Circuit and on March 29, 1963 that court affirmed the District Court, which opinion appears as Appendix A to the petition for writ of certiorari.

QUESTIONS PRESENTED

The petition states that there are three questions involved which should give rise to this Court's exercising its discretionary power in issuing a writ of certiorari. The questions presented are as follows:

1. AN UNRECORDED INSTRUMENT MODIFYING AND ALTERING THE TERMS OF A RECORDED INSTRUMENT CANNOT AFFECT A BANKRUPT ESTATE SIMPLY BECAUSE BOTH INSTRUMENTS PRIOR TO THE BANKRUPTCY PROCEEDINGS WERE EXECUTED BY A PARTY SUBSEQUENTLY APPOINTED IN THE BANKRUPTCY PROCEEDINGS

AS THE DEBTOR IN POSSESSION FOR THE ESTATE.

2. A LIEN ON REAL ESTATE, THE TITLE TO WHICH IS IN A BANKRUPT ESTATE, NOT HAVING BEEN ESTABLISHED OR PROVED, CANNOT BE VALID.

3. THE STATUS OF A LIEN ON REALTY, THE TITLE TO WHICH IS IN A BANKRUPT ESTATE, IS CONTROLLED BY THE STATE RECORDING STATUTES AS INTERPRETED BY THE VARIOUS STATE COURTS WHEREIN SAID REAL REAL ESTATE IS LOCATED, AND BY THE RESTRICTION CONTAINED IN THE ACTS OF CONGRESS RELATING TO BANKRUPTCY.

The Pension Fund will respond to each of the questions raised for a two-fold purpose, first to show that there is no substantial question raised, as required by Rule 19 of the Revised Supreme Court Rules, and second to the merits of each question to demonstrate the correctness of the decision of the Court of Appeals.

ARGUMENT.

QUESTION 1. AN UNRECORDED INSTRUMENT MODIFYING AND ALTERING THE TERMS OF A RECORDED INSTRUMENT CANNOT AFFECT A BANKRUPT ESTATE SIMPLY BECAUSE BOTH INSTRUMENTS PRIOR TO THE BANKRUPTCY PROCEED-

INGS WERE EXECUTED BY A PARTY SUBSEQUENTLY APPOINTED IN THE BANKRUPTCY PROCEEDINGS AS THE DEBTOR IN POSSESSION FOR THE ESTATE.

Under this question, Connelly takes issue with the opinion of the Court of Appeals which found that he, as debtor in possession, was bound by the unrecorded loan and pledge agreement. As can be noted by previous statements in this brief, this was not the real issue before the Court of Appeals, but it did comment about Connelly's argument on this point. The reasoning of the court in reaching this conclusion is simply one of interpretation of the law of Virginia concerning constructive notice. Nowhere does the opinion of the Court of Appeals attempt to hold that a trustee appointed in bankruptcy proceedings, or a debtor in possession, can be bound by unrecorded instruments between the debtor and a third person. The holding of the Court of Appeals was that the statement contained in the recorded deed of trust, that said deed was collateral security for a larger loan on property in Dade County, Florida, was sufficient under the Virginia constructive notice law, and also Florida law, to put a prudent person on notice concerning other unrecorded agreements existing between the parties on the same subject. This is clearly in line with the law of Virginia and the law of Florida. In the case of **Chavis v. Gibbs, 198 Va. 379, 94 S.E.2d 195** (1956, S.Ct. of Appeals of Va.) the Virginia court, in construing the recording statutes and notice given thereby, stated:

> "It is an established rule in Virginia that where a party purchases an estate which is subject to the right of another and that right is shown by

the chain of title paper **the purchaser is charged with notice** of all that the title paper or papers to which they refer may disclose upon complete examination, citing Effinger v. Hall, 81 Va. 94; Burwell v. Fauber, 21 Grat. 446; Virginia Iron Coal and Coke Co. v. Roberts, 103 Va. 661, 49 S.E. 984, and authorities cited therein (emphasis supplied)."

Also in the case of **O'Neill v. Cole, 194 Va. 50, 72 S.E. 2d 382**, cited by the Court of Appeals, the court said:

> "The means of knowledge are equivalent to actual knowledge and knowledge of facts sufficient to suggest inquiry which, if made, would lead to knowledge of the facts in question is sufficient to charge one with notice of the latter facts."

In Volume 8, Code of Virginia 1950 Replacement 55-59 titled "How Deeds of Trust Construed, etc. * * * 1. The deed shall be construed as given to secure the performance of **each of the covenants entered into by the grantor** as well as the payment of the primary obligation (emphasis supplied)."

There is nothing in the opinion of the Court of Appeals that is in any way a radical departure from the precept of the bankruptcy law. The holding with regard to the binding effect of the loan and pledge agreement on Connolly, as debtor in possession, is merely the following by the Court of Appeals of the constructive notice law of Virginia and nothing more.

The point with regard to the binding effect of the loan and pledge agreement is really dicta. The sole question for determination by the Court of Appeals was whether or not the $2,500,000 bid at the foreclosure sale was a payment which would satisfy the conditions stated in the deed of trust. Your Respondent does not find that the Petitioner contends that the decision on this point was incorrect.

QUESTION 2. A LIEN ON REAL ESTATE, THE TITLE TO WHICH IS IN A BANKRUPT ESTATE NOT HAVING BEEN ESTABLISHED OR PROVED, CANNOT BE VALID.

This question borders on the ridiculous. There was no finding by the Referee in Bankruptcy, the District Court or the Court of Appeals that the deed of trust of the Pension Fund on this Virginia property was not proven. To the contrary, the validity of the deed of trust was admitted by Connelly in his reply to the original answer to the order to show cause to the Referee in Bankruptcy (R 46). If the lien of the deed of trust was not proven, then how could the Referee have found that the conditions of the deed had been satisfied and ordered said deed of trust cancelled of record as having been fully satisfied?

If Connelly felt the Pension Fund failed to establish its lien, then he should have sought review of that point in the District Court. When he did not, then the decision on that point is final (R 129).

Leaving that point, we find that the deed of trust was received in evidence without objection and was

identified by Connelly. The amount still remains due on the original mortgage given by Connelly to the Pension Fund was established by the simple arithmetical calculation of subtracting $2,500,000 from the amount stated in the final decree of foreclosure. The final decree was in evidence and is part of this record (R 1).

QUESTION 3. THE STATUS OF A LIEN ON REALTY, THE TITLE TO WHICH IS IN A BANKRUPT ESTATE, IS CONTROLLED BY THE STATE RECORDING STATUTES AS INTERPRETED BY THE VARIOUS STATE COURTS WHEREIN SAID REAL ESTATE IS LOCATED, AND BY THE RESTRICTION CONTAINED IN THE ACTS OF CONGRESS RELATING TO BANKRUPTCY.

A part of the answer to this question already has been discussed under your Respondent's argument of Question 1. It is respectfully submitted that the Virginia statutes and opinions of the Virginia courts amply sustain the Court of Appeals' construction of the recording statue of Virginia and the notice to be implied therefrom.

Petitioner asserts that he does not fall within the two categories covered by the Virginia recording statutes. The Virginia statute speaks of prospective purchasers and future encumbrancers. Under some theory not readily apparent from the argument of Petitioner, Connelly takes the position that he, as a trustee or debtor in possession, is not a prospective purchaser or a future encumbrancer. Section 70 of the Bankruptcy Act, 11 U.S.C. 110, is abundantly clear that the title of a trustee

or debtor in possession is equivalent, as stated in Section 3 thereof, to a creditor of the bankrupt who claims a lien by legal or equitable proceedings as of the date of bankruptcy. There is no question that the deed of trust given by Connelly to the Pension Fund on the Virginia property was dated and recorded prior to the institution of any bankruptcy proceedings by Connelly. As debtor in possession under the terms of Section 70 of the Act, Connelly must be classified as a future encumbrancer under the terms of the Virginia recording statute.

Connelly, as debtor in possession, stands in the same position in regard to the prior recorded deed of trust as any other subsequent lien creditor. He would take with the same notice, under the Virginia recording statute, as any other future encumbrancer.

ON THE QUESTION OF DEFICIENCY: The Petitioner has again attempted, as he did in the Court of Appeals, to throw confusion into this cause by raising the question of the right of the Pension Fund to a deficiency decree and the effect that it may have upon the rights of your Respondent in connection with its lien on the Virginia property involved in this litigation.

As was stated by the Court of Appeals, Connelly did not raise this question on petition for review from the order of the Referee in Bankruptcy; therefore, it was not a proper subject to be raised on appeal.

The opinion of the Court of Appeals, after reaching the conclusion that the matter was not properly before it, did give Connelly the benefit of its comments on this question. The Court of Appeals held, as did the District

Court, that the question of a deficiency could not become involved in the proceedings until after the creditor had exhausted his security. This is obviously a correct principle of law. By its very definition, a deficiency decree is a personal judgment entered against the signers of the promissory note after the holder of the note has exhausted, by sale or other proceedings, all of the security that was pledged for the payment of the note. See: **Grace v. Hendricks (Fla.) 140 So. 790; Commercial Bank of Ocala v. First National Bank (Fla.) 87 So. 315; Bank of Douglas v. Neal (Ariz.) 247 Pac. 132, 134; State ex rel. Squire v. Pejsa (Ohio) 72 N.E.2d 374; Stretch v. Murphy (Ore.) 112 P.2d 1018; Vol. 12, Permanent Edition, Words and Phrases, Deficiency Judgment.**

Your Respondent has no argument with the Petitioner's abstract theory of law that the awarding of deficiency decrees is within the sound discretion of the court. This is established by Florida Statute 702.06, but this would not allow a court to cancel the lien on one of several parcels of land given to secure a mortgage indebtedness when the sale of the other parcels has not produced sufficient funds to pay the amount of the indebtedness due.

The question of the value of the property involved could have some effect on the court in exercising its sound judicial discretion in determining whether or not it will grant a judgment against the makers of the obligation, but certainly this discretion would not allow a court to cancel the specific lien on property given by the mortgagor to secure the loan.

It is only logical that this question of discretion of

the court would not come into play until after all of the security given for the obligation has been exhausted. If this is not true, then the court would be changing the contract of the parties.

In his argument, the Petitioner makes the following statement:

> "The Opinion below fails to apply the legal doctrine of operation of the discharge from a lien of one of several parcels of real estate given as security for the repayment of an indebtedness, where the value of one parcel (which has been foreclosed) is sufficient to discharge the total obligation owed. Hence, if the mortgagee redeems one of several parcels, he discharges from the lien the remaining properties." (Pages 19-20 of Connelly's petition herein.)

Petitioner cites no authority to support such a legal doctrine. It is respectfully submitted there is none and that the contrary is true. See: **City of Sanford v. Ashton (Fla. 1938), 179 So. 765.**

The Petitioner states that the doctrine of which he speaks is recognized in Virginia and he cites §55-66.1 of 8 Code of Virginia as authority. A reading of said section of the Virginia code demonstrates the fallacy of this entire argument. This section merely authorizes a lienor, if he so desires for valuable consideration, to release a portion of property secured by a mortgage without being worried such partial release might be construed as a discharge of the whole. This statute is absolutely of no solace or substantiation to the argument of the Petitioner.

CONCLUSION

It is respectfully submitted that the Petitioner has wholly failed to show any basis for the granting of certiorari in this cause. The decision of the Court of Appeals in no way confuses the law and is not in conflict with the opinion of any other Circuit or of this Court, nor is it in conflict with any applicable law of Virginia or of Florida.

The only real question before the Referee in Bankruptcy, the United States District Court and the United States Court of Appeals for the Fifth Circuit was whether or not the bid of $2,500,000 by the Pension Fund at the foreclosure sale was payment on the mortgage, which would result in a cancellation of such deed of trust.

The Referee answered this question in the affirmative; the District Court and the Court of Appeals both held that a bid at a foreclosure sale was not payment as prescribed in the deed of trust.

Respondent does not find any statement in the Petition for Writ of Certiorari which attempts to point out that the decision on this point by the Court of Appeals was in error or in conflict with any other decision.

The argument made by the Petitioner is an argument against a portion of the opinion which is mere dicta and was not the real point in issue.

Putting aside the question that portions of the opinion of the Court of Appeals were not dicta, the Petitioner still has not pointed out any error in the state-

merits made by the Court of Appeals in applying the Bankruptcy Act, the laws of the State of Virginia and the laws of the State of Florida to the question involved, which would comply with Rule 19 of the Revised Supreme Court Rules.

It is respectfully submitted that certiorari should be denied.

Respectfully submitted,

ROBERT C. WARD
1240 duPont Building
Miami, Florida — 33131
Attorney for Respondent

WARD & WARD
1240 duPont Building
Miami, Florida — 33131
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief has been served on Mr. Irving M. Wolff, Attorney for Petitioner, 1204 Biscayne Building, Miami, Florida, 33131, by depositing same in a United States post office, with first class postage prepaid, addressed to such counsel at the address indicated, this 14th day of September, 1963.

Robert C. Ward